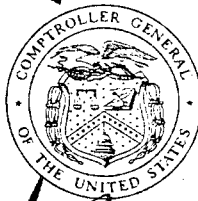


DECISION

17831
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

[Protest of Bid Rejection as Nonresponsive]

FILE: B-200382

DATE: April 22, 1981

MATTER OF: Orlotronics Corporation

DIGEST:

Bid which contained higher price for option quantity than for base quantity, in derogation of IFB provision that option price was not to exceed price bid on base quantity and despite cautionary note in IFB that such bids may be accepted only if other bidders were not prejudiced, was properly rejected, since deviation could be prejudicial to all bidders who submitted bids in conformance with terms of IFB and has practical effect of depriving Government of benefit of option.

Orlotronics Corporation protests the proposed award of a contract to Port-O-Flex, Incorporated resulting from invitation for bids (IFB) DAAE07-80-B-B420 issued by the U.S. Army Tank-Automotive Material Readiness Command for 33 hose assemblies. Orlotronics contends that its bid was improperly rejected as being nonresponsive and that as the low bidder it is entitled to the award.

Orlotronics was the low bidder on the base quantity of 33 on which bids were evaluated. Its unit prices for option quantities, however, exceeded its unit price for the basic quantity. The bid was rejected by the Army because the method of option pricing was deemed prejudicial to the other bidders in violation of section J01 of the IFB. Section J01 reserves for the Government the right to increase the quantity of each item by an additional number of units not to exceed 50 percent of the original contract quantity and requires that "[t]he price for such option quantity shall be no higher than the original contract price." Section

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J01 also included the following capitalized cautionary note: "Bid or offer containing an option price higher than the base price may be accepted only if such acceptance does not prejudice any other bid or offer." The Army determined that Orlotronics' failure to comply with the option pricing restriction was prejudicial to the other bidders. In this regard, the Army points out that the facts of the instant case are essentially identical to those in ABL General Systems Corporation, 54 Comp. Gen. 476 (1974), 74-2 CPD 318, in which we denied the protest of the rejected bidder.

Orlotronics contends that the IFB "invited" the submission of option prices higher than the base price by the inclusion of the cautionary note and that therefore its bid is responsive despite the higher option price. It also contends that the higher option prices do not prejudice any other bid or offer, because the next lowest bidder had the same opportunity to submit higher option prices.

The protester's argument ignores the context out of which the cautionary note arose. As the protester concedes, in ABL General Systems Corporation, *supra*, we upheld the rejection of a bid under circumstances similar to the present case. However, we thought that in the future solicitations should warn bidders of the possible consequences of their actions. Our recommendation to this effect led to a revision of Defense Acquisition Regulation (DAR) § 1-1503(d)(ii) which prescribes the use of the cautionary note which appears in the present IFB. This note does not invite option prices which differ from the base bid. Rather, it warns bidders that they run the risk of bid rejection if they structure their bids in that way.

In cases where the base bid and higher option prices are both lower than the next low bid, the bidder does not appear to gain any material advantage over other bidders; similarly, the Government does not appear to be materially disadvantaged since the option prices offered are below any

other offered price. In such cases, we viewed the bidder's failure to adhere to the ceiling on option prices as properly waivable. 44 Comp. Gen. 581 (1965) and B-176356, Nov. 8, 1972, discussed in ABL General Systems Corp., supra.

However, where the low base bid offers option prices which are higher than the prices offered in another bid, there is a significant likelihood of prejudice either to other bidders or to the Government or to both. In ABL, we were concerned with prejudice to other bidders. Here, we think acceptance of Orlotronics's bid would be prejudicial to the Government because it has the practical effect of depriving the Government of the benefit of the option.

Orlotronics bid \$300 per unit on the base quantity, and a range of \$390 to \$700 per unit for progressively smaller increments of the option quantity. As contemplated by the IFB, Port-O-Flex bid \$400 per unit for both the base and option quantities. The third low bidder offered \$445 per unit for all quantities. A contracting officer may exercise an option only after determining that it would be the most advantageous method of fulfilling the Government's need. This determination includes consideration of whether the option represents the best price available. DAR § 1-1505 (DPC No. 76-6 Jan. 31, 1977). If award were made to Orlotronics, its unit price for the base quantity would be \$300. However, under the terms of that firm's bid, should the Government exercise an option to purchase four additional hose assemblies, for example, it would be obligated to pay a unit price of \$700 for those items. We do not believe the contracting officer reasonably could determine that the option price of \$700 per unit was most advantageous to the Government when three bidders under this solicitation had offered unit prices between \$300 and \$445. Thus, the effect of Orlotronics' method of bidding is to foreclose the Government from obtaining the benefit of the option provision. See 51 Comp. Gen. 528, 530 (1972).

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Accordingly, the protest of Orlotronics is denied.

Milton J. Aroslan

Acting Comptroller General
of the United States